Judicial reforms in transition:
Legacy of the past and judicial institutionalization in post-communist countries

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Abstract:

The breakdown of authoritarian regimes in Eastern Europe and the incremental democratisation of such regimes is surely one of the most crucial events in the last two decades. In these contexts, the functioning of justice systems has become, more and more, one of the key aspects of the transition process.
In this context, the article analyses the process of judicial reform in Slovenia, Croatia and Serbia. The article aims to explore how theoretical approaches developed by comparative judicial studies scholars fare against the evidence from the democratising process of the judiciary in such countries. Then, particular attention will be focused upon the level of institutionalization of the judicial systems, trying to explain why judicial systems in these countries continue to be poorly institutionalized.

1. Introduction[1]

The breakdown of authoritarian and totalitarians regimes in Eastern Europe over the last two decades and the slow democratisation of such regimes is one of the most significant political and historical events of the last century. In these contexts, the functioning of justice systems has become, more and more, one of the key aspects of the transition process. The establishment of an independent, fair and efficient judicial system is in fact an important instrument for a country breaking with its authoritarian past. Courts became crucial actors in the transition process as they contribute to develop new legislations, to adapt old rules to the new context and to prevent the arbitrary use of power (Larkins 1986, Kryger, Czarnota and Sadurski 2006). Notwithstanding, the experience of some of those countries highlighted that the reform of the judicial system represents a crucial policy field, extremely resilient to changes and particularly threatened by political actors influences.

This article analyses the process of judicial reform in three post-communist countries (Slovenia, Croatia and Serbia) belonging to the Former Yugoslavia. These countries, although with some differences, had experienced a long, difficult and unfinished process of judicial reform. Analysing the processes of judicial reform in the three countries, the article aims also to show how the main theoretical approaches applied by comparative judicial scholars to analyse judicial reform in

[1] An early version of this paper has been presented at the Joint Annual Meeting of the Law and Society Association (LSA) and the Research Committee on Sociology of Law (RCSL), Berlin, Humboldt University, 25-28 July 2007.

transitional countries fare against the evidence in the case studies. Particular attention will be also paid at the level of institutionalization of the judicial systems, trying to explain why judicial systems in these countries continue to be poorly institutionalized.

2. Judicial reforms in transition: main theoretical approaches and concerns

Within the comparative judicial studies literature, two are the main theoretical approaches used by the scholars to explain judicial reforms in transitional countries (Magalhaes 1999, Ishiyama and Ishiyama 2000, Herron and Randazzo 2000, Boulanger 2003). The first approach argues for the importance of the institutional and cultural legacy of the preceding undemocratic regimes that conditions the adoption of democratic institutional arrangements. The second perspective emphasizes new political actors' self-interest strategies and considers the outcome of the reforms as the product of bargaining among the main political players (Magalhaes, Guarnieri and Kaminis 2006)

With reference to the judicial system, the first theoretical approach, we call "*legacy of the past approach*" was originally applied by Toharia (1975)[2], in his work on the magistracy during the Franco's regime in Spain. According to Toharia in the context of authoritarian regimes, the judiciary enjoys some limited guarantees of independence. The regime influences the nomination of judges on a higher level, to which it entrusts the management of the corps. The judiciary is 'isolated' and its action limited to cases with no political relevance, whereas significant cases are directly controlled by the executive power (Guarnieri 2003). On the other hand, in the context of totalitarian regimes[3], the judiciary is totally controlled and integrated into the political system, and its guarantee of independence strongly reduced. The decisions made by the judiciary must not clash with the regime. The magistracy is actually mobilized in support of the regime by integrating judges into the regime's political organizations. In this case guarantees of independence are non-existent and the recruitment and career systems deeply controlled. According to this view, it could be expected that in post-totalitarian countries, due to the deep politicization of those structures and their constant subordination to the executives during the undemocratic regimes, judicial systems remain weakly professionalized and resilient to change. On the other hand, in post-authoritarian cases one expects that judicial systems maintain some technical and professional standards in decision-making, as the traditional criteria of recruitment and socialization of judicial personnel coexist with political ones. Consequently, the democratization of the judiciary would be quicker and

[2] Toharia took inspiration as well from an idea developed by Linz (1964) regarding the characteristics of the judiciary in authoritarian regimes.

[3] Guarnieri (2003) specifies that when talking about totalitarian regimes he mainly refers to the Nazi Germany and to the communist regimes of the Stalin era.

easier. Given such distinction, although the Yugoslavian federative republic belonged to the authoritarian type, if one looks at the Linz' (1964) definition, we notice that the judicial systems in the three case studies show post-totalitarian traits rather than post-authoritarian ones. The organization of the justice during the Federative Republic of Yugoslavia (and also during the 90s in some countries) was in fact rather similar to the Soviet model of justice, thus presenting more totalitarian traits than authoritarian ones.

The second perspective, according to which the outcome of judicial reforms represents the result of struggles between self-interest political actors, emerges from the Rational Choice literature[4]. As Magalhaes (1999) points out, given the relevance and centrality of judicial institutions in the moment of transition, these are modelled according to the strategies of the dominant political actors, which try to maximise the congruence between the new structures and their own interests. Political actors are interested in controlling the design of judicial institutions for two reasons: the reform of judicial institutions determine the extent to which political actors can affect the composition of courts, allowing or preventing their influence over judicial appointments; secondly, the rules regarding status and career influence the responsiveness of judiciary to political actors. The control over these kinds of rules increases the congruence between judicial institutions and actors interests and preferences (Guarnieri and Pederzoli 2002).

The preferences of the parties and their strategies about the design of judicial institutions are also shaped by the degree of uncertainty about electoral results. This last perspective is further developed by Ginsburg (2003), in his work on constitutional courts in new democracies and by Hirschl (2004), in his contribution on the origin of the new constitutionalism. Summarizing the Ginsburg analysis, political parties in power will be more willing to create strong courts when the political future is uncertain, as they fear that they will likely be in minority and thus may require extra protection to ensure that the other parties will not be able to abuse them. On a similar line, Hirschl (2004) specifies also that this judicial empowerment is likely to occur when the judiciary public reputation for professionalism and political impartiality is high and when judicial appointment is controlled by hegemonic political elites. Although both the Ginsburg and the Hirschl analysis are fascinating and fit well in explaining the empowerment of judiciary that occurred for example in the post-authoritarian judicial reform in Spain and Portugal, they are not fully telling in the countries selected.

[4] This hypothesis, which has also been developed in the field of the Rational Choice approach, is based on the well-known utilitarist paradox according to which the actors' main goal is to maximise their personal interests. As Guarnieri and Magalhaes (2006) suggest, the issue n.28 of *Comparative Political Studies*, 1995 (especially the essays from Crawford e Lijphart, Comisso, Geddes and Hanson), represents a good example for the empirical application of this approach to post communist transformations. Two authoritative contributions to this approach are those of Di Palma (1990) and Przeworski (1991).

We believe that a deeper explanation to understand judicial reforms in our case studies could be reached considering also the institutionalization process of the judiciaries in the ex-Yugoslavia and the actual level of judicial systems institutionalization in these countries.

3. Judicial institutionalization in democratizing countries

In order to analyse the output of judicial reforms in democratizing countries we have to keep in mind first of all that we are addressing the development of an historically dependent judiciary into an institution that could operate forcefully to enact neutral justice (Larkins 1996). What seems to be relevant in order to understand the judicial reform patterns in transitional countries is the degree to which courts are able to attain the qualities of a viable institution (Huntington 1968); in other words, the process of institutionalization *"by which organizations and procedures acquire value and stability"* (p. 12).

According to the recent work of Bumin, Randazzo and Walker (2005)[5], examining in a comparative perspective the institutional development of the judiciary in thirty-nine post-communist and in Latin America states[6], in order to understand judicial reform within a transitional country it is first of all necessary to consider the level of institutionalization of the judiciary in such a country. In fact, the judiciaries are able to play a significant role in the democratisation process, only if they develop a certain levels of organizational sophistication and autonomy. Only in this case judicial institutions become strategically relevant within the political system and could represent a mean for political elite to safeguard their interests.

Although many scholars[7] have proposed different indicators to measure the level of institutionalization, this remains an abstract concept difficult to operazionalize in empirical terms. Huntington (1968), in his seminal work, argues that the level of institutionalization of any particular organization can be defined and measured by its adaptability, complexity, autonomy and coherency. *Adaptability* can partly be deduced from longevity, but also entails functional adaptation, in fact "*an organization that has adapted itself to changes in its environments and survived one or more changes in its principal functions is more highly institutionalized*." (ibidem p.15). Organizational *complexity* may involve "*both multiplication of organizational subunits (hierarchically and functional), and differentiation of separate type of organizational subunits*." (ibidem p.18).

[5] Bumin, Randazzo and Walker make explicit reference to the work of McGuire (2004) on the U.S. Supreme Court process of institutionalization.

[6] The authors choose several indicators of the component features of institutional viability and employ factor analysis to produce a viability score.

[7] The literature on the organizational institutionalization is broad; Lanzalaco (1995) in his work proposes to differentiate between the "classical" or "old" school of institutional studies (among those Weber, Durkheim, Veblen, Ayres, Selznick, Huntington, etc.), and the neo-institutional school, developed during the 80s (Scott, Di Maggio, Powell, March and Olsen, etc.). An other development of the institutional studies is represented by those studies that applied the neo-classical economical theory to explain the organisational institutionalisation (Riker, North, Ostrom, Schotter, Williamson). This distinction between "old" and "new" institutionalism has been discussed by many scholars.

Autonomy refers to the extent to which organisational and procedures exist independently of other groups, organizations and behaviors. *Coherence* has to do with the degree of consensus within the organization on its functional boundaries and on procedures for resolving disputes that arise within these boundaries (Randall and Svåsand 2002). Autonomy becomes a means to coherence, enabling organization to develop a distinctive esprit and style and prevents the intrusion of disruptive external forces.

Taking inspiration by the Huntington (1968) seminal work and by the Bumin, Randazzo and Walker recent proposal, we focused our analysis on some aspects of judicial reforms that could help us in assessing the level of *complexity, autonomy* and *coherence* of the judiciary in the three countries. The following section will present the analysis of the judicial reform patterns in the countries selected, with a particular attention to the empirical aspects listed in Table 1[8].

Table 1. Dimensions of judicial institutionalisation analysed in each country

Dimension of institutionalization	**Aspects analyzed in each country**
Complexity	- Hierarchical structure - Courts Diffusion on the territory (horizontal structure) - Stages of appeal - Specialized courts
Autonomy	- Constitutional guarantees - Role of a self-governing body - Executive power on judicial administration - External influence on the selection process - Courts jurisdiction
Coherence	- Role and status of the judges unions - Nature of professional socialization - Organisation of the training system

Thus, the focus will be on the main features of judicial organization and administration, on the existence of a self-governing body (and its functioning), on judicial recruitment, on the existence of a judges representative (and its effective role), and finally on the more recent development of the judicial reform. The sources of empirical data are primarily reports and records of international organizations monitoring judicial reforms (such as Aba-Ceeli, EUMAP, and the EU) and information gathered through semi-structured interviews to strategic actors collected during on-site visits in the countries. In some cases also newspaper articles have been used.

3. Background conditions

In the Balkan region the Romanist civil law tradition was introduced only after centuries of Ottoman domination, especially in the countries of the Southern Balkans. Although Slovenia and

[8] The dimension definitions and the selection of the empirical aspects are drawn on the work of Guarnieri and Pederzoli (2002).

Croatia were the two regions less touched by the Ottoman domination, the strong Hungarian traditions and usages avoided the fully penetration of Romanist civil law in the area until the beginning of the XIX century (Benacchio 1995). Moreover during the XIX century, the unstable socio-political system reigning in these countries delayed the common development and modernisation of the political and administrative institutions (Hosch 2006). After 1918, the new State of Serbs, Croats and Slovene (in 1921 it became Yugoslavia) was formed. The legal organization of this state was very diverse, partially ranged form Austrian and Hungarian sources, from Italian law and from the Sharia (Islamic law, especially in Serbia and Bosnia). Never were the organization and the status of judges in this state uniform, as the state was divided in six "legal areas" (Uzelac 2000). The first common codified legislation was enacted only in 1929 (Code of Civil Procedure).

Thus, when Balkan countries entered the Soviet sphere of influence, a fully institutionalised judiciary system did not yet exist. Many judicial institutions (Constitutional Court, High courts and tribunals) were in fact created during the soviet experience. Although Yugoslavian socialism increasingly differed from the soviet model as a result of decentralization and greater respect for local autonomy (Bianchini 1986), the organization of justice in the Yugoslavian model had many features in common with the soviet one. This model spread across the Eastern Block countries in the period following the Second World War and it followed the judicial experience of the Soviet State. Judicial organization took most inspiration from the principle of the "unity of power" and its corollary. Judges were selected through an election system that granted them *pro-tempore* representative powers, thus making them responsible for the body that elected them. Jurymen participated with magistrates in the different instances of judgment. No judicial control was exercised over the constitutionality of any normative acts. Even after Tito's rejection of Stalinism, in Yugoslavia the organization and function of justice never detached from the basis of the socialist right (Ajani 1996).

The Yugoslavian Socialist Republic Constitution of 1974 perfectly matches the principles described above and generically proclaims the principle of independence of judges. In practice, from election to confirmation, judges and their work were in fact controlled by party organizations. However, Uzelac (2003) highlights that in socialist Yugoslavia political intervention in the judicial sphere were not intense as during the Stalin era in the Soviet Union. Overall the judiciary was neglected and marginalized, as the majority of social problems were solved through party mechanisms and other non-institutional channels. Judges' decisions were usually still limited to dismissal of public officers, and the incrimination of opponents or intellectuals criticizing the dominant ideology.

Two parallel systems of conflict-resolution were in place during the Socialist Republic: one, at the party level tended to prevent and resolve every significant disputes by political talks; the other, the traditional court system, was in charge of less important matters, such as small claims and land-related issues, etc. (Uzelac 2000). Party members and political exponents were granted absolute immunity. In the 60s and 70s judges were frequently publicly recalled for not being rigorous enough in cases related to verbal offences against the party. Tito himself delivered a speech in relation to this topic in 1967.

Although one could argue that this "parallel system" of conflict resolution was quite common in the authoritarian regimes (see Toharia 1975), the main difference concerning the Yugoslavian system of justice laid in the full party control over the appointment and career procedure. An evaluation concerning the political suitability of individuals was a major criterion in the initial selection and re-election of judges. Although party interference operated in a rather subtle and indirect manner during the SFRY (Socialist Federative Republic of Yugoslavia), the legal system continued to function as an instrument for the suppression of political dissidence (Cohen 1992), social status and prestige of judges significantly decreased and consequently they progressively became less professionalized in terms of their qualifications.

Nevertheless, the fact that many of the judicial institutions, like the federal Constitutional court, the State Constitutional courts and the State Supreme Courts, were established during these years, suggests that at least the level of organizational *complexity* (Huntington 1968) was improved during the SFRY. While the other dimensions of institutionalization (*autonomy* and *coherence*) remained low. In fact, the judiciary was not clearly distinct from other political organizations and its role was marginalized. Moreover, although in the Federal Republic Constitution, as well as in the Constitution of each republic, judicial independence was formally guaranteed, in practice procedures protecting independence of the institution vis-à-vis other political actors were never implemented. During the 90s, after the desegregation of the FRY, the first relevant change that each states had to face was to establish the primacy of the national legal system, eliminating any references to the federal one. Slovenia and Croatia were the two states that more quickly started this process. Some scholars (see in particular Cohen 1992) evidence that the Yugoslavian desegregation had a significant impact also on the administration of justice. The most important change was the changing locus and character of political influence as well as new obstacles to the development of an independent and depoliticized judiciary, especially in Serbia and Croatia. In what follows, the main steps of the judicial reform[9] since the 1990s until today will be presented.

[9] Given the space limits, I will present here only a brief summary of the three case studies focusing on the more relevant aspects for the paper topic.

4. Judicial reforms in Slovenia

The Slovene legal system belongs to the continental legal systems, under the influence of German law and legal order, as the territory was a part of the Austrian Empire for a long time. The legal system was transformed according to the socialist models, when the territory joined the Yugoslav republic. The impact of the institutes such as socialized property, socialistic self-management, protection of workers and lower social class can still be found in the legal system today(Čarni and Košak 2006).

The Republic of Slovenia became an independent and sovereign state on June 1991[10]. Slovenia experienced a relatively smooth democratic transition, as the independence was the result of gradual political and social changes starting from the 80s (Toš and Miheljak 2002). Some months after the independence, the Constitution of the Republic of Slovenia was adopted, introducing the principle of the separation of powers and defining the task of the judicial branch. In addition to these basic provisions, the constitution determines that the judges shall independently exercise their duties and lays out the basic principles on the organisation and jurisdiction of the courts, the participation of citizens in the performance of judicial functions, the election of judges, the Judicial Council, and other relevant principles (Supreme Court of the Republic of Slovenia 2007). During the first years after the independence (1991-1994) there was not a comprehensive reform of the judiciary, as the judiciary was quite functioning and it was not perceived as one of the more urgent need for the country. In fact, Slovenian political elite chose to focus on the restructuring of national economy. With this aim three important laws were passed: law on society ownership, law on nationalization (to give back the nationalized properties) and law on privatization. Although these laws were not directly related to the organization of justice, they have had a direct impact of the judiciary as, due to the high political relevance of the application of such laws, the pressure of the political parties over the judiciary started to increase.

Coehn (1992) argues that, at the beginning of the 90s, some cases of what it defines the ethno-political justice occurred even in Slovenia. The fact that some Slovenian political leaders were disillusioned communist and former political dissidents, persecuted and imprisoned by the communist regime, brought to some cases of unjustified dismissal and replacement. However, this happened to a minor extent in comparison to the other countries. Thus, if one looks at the constitutional guarantees and at the judicial framework provided by the Constitution after the transition, it could be argued that this specific dimension of the level of *autonomy* improved in respect to the Federal Republic period.

[10] On 23 December 1990, 88% of Slovenia's population voted for independence in a plebiscite, and on 25 June 1991 the Republic of Slovenia declared its independence.

JUDICIAL ORGANIZATION AND ADMINISTRATION

The most important laws regulating the functioning of the judiciary were passed in 1994: the Constitutional Court Act[11], the Judicial Service Act[12] and the Courts Act[13]. These are still today the laws that regulate the organization and the functioning of the Slovenian judicial system. The 1994 Judicial Service Act and the Courts Act introduced important changes, especially in organizational terms. The first instance courts were divided in county courts of first instance and in district courts of first instance. This separation of the basics courts caused the left of many judges because the salary was extremely reduced. The number of judges decreased, the number of cases increased as the economic reforms implied an high number of trials and proceedings on economic and financial matters. According to the Judges Association, in this period originated the high Slovenian backlog that still is the major problem of the country. The representative of the Judges Association[14] argues that during this phase the position of the judiciary vis-à-vis other institutions started to be undermined and the political interference over economic-sensitive cases increased (cases regarding enterprises denationalization, restitution of confiscated goods, etc.).

Today there are 43 County courts and 11 District courts and 2 stages of appeal, first to the High courts and the second one to the Supreme Court of the Republic of Slovenia. The Supreme Court is the highest appellate court in the state. It works primarily as a court of cassation[15]. There are also four specialized Labor Courts, a Social and Labor Court, and a Social and Labor Court of Appeal. In 1998, an Administrative Court was established as a specialised court with divisions in four cities. Organizational *complexity* is thus quite developed and in line with all other Western European countries. Formally, Judicial Council, the Ministry of Justice and the president of courts shared the main function of the judicial system governance. The courts presidents, assisted by the personnel councils, manage individual courts while the Judicial Council and the Minister of Justice share the administrative tasks at national level. This mixed system of judges administration between judicial and political bodies should distribute control and accountability across various branches and institutions. According to the EU reports, the system has proven to be quite functioning and effective, while other sources (see in particular EUMAP 2001) and the representative of the Judges Association claimed that courts depend on the executive for a variety of services (organization an

[11] Official Gazette of the Republic of Slovenia,2 April 1994.
[12] Official Gazette of the Republic of Slovenia,13 April 1994.
[13] Official Gazette of the Republic of Slovenia, 13 April 1994.
[14] Interview with the President of the Judges Association of Slovenia, 2007 April 13th Ljubljana
[15] The Supreme Court is the highest appellate court in the state. It works primarily as a court of cassation. It is a court of appellate jurisdiction in criminal and civil cases, in commercial lawsuits, in cases of administrative review and in labor and social security disputes. It is the court of third instance in almost all the cases within its jurisdiction. The grounds of appeal to the Supreme Court (defined as extraordinary legal remedies in Slovenian procedural laws) are therefore limited to issues of substantive law and to the most severe breaches of procedure (Čarni and Košak 2006).

operation of courts, personnel, material and infrastructure support, etc.) and that the Ministry retains a key role in appointing and removing the court presidents.

SELF-GOVERNING BODY

The 1991 Constitution established also the Judicial Council (Art. 130-131) as an autonomous state body. The Judicial Council is composed of eleven members elected for a non-renewable five-year term; five of them elected by the National Assembly on the proposal of the President of the Republic from among university professors of law, attorneys and other lawyers[16], and the other six members are elected by judges holding permanent judicial office from among their own number[17]. The Supreme Court elects one member among them.

The position and the competence of the Judicial Council were defined only in 1994, when the Courts Act has been settled out. Article 28 established in fact that the Council shall propose candidates to the National Assembly to be elected to judicial office; to propose the dismissal of a judge; decide on the incompatibility, give an opinion on the status, rights and duties as well as judicial personnel; and exercise other administrative functions (Courts Act 1994). The Italian "*Consiglio Superiore della Magistratura*" inspired the Slovenian Council model.[18] However, unlike the Italian one, more competences remain in the hands of the Ministry or of the National Assembly. From its first establishment, in 1994, the Council worked quite well, it acquired a good level of legitimacy in its relation with both with the National Assembly and the other political institutions, and with the judge's representative. Only some cases of discordance between the Council and the National assembly on judge's appointment have been reported by the international observer (EU Regular Reports, EUMAP 2001) and by the experts interviewed.

SELECTION PROCESS

The Judicial Council is entitled to propose the candidate for the first appointment to the National Assembly. Among other conditions (see Court Act) the candidates for judges have to be lawyers with the state's law exam, with at least 3 years of work in law after the exam.

The selection process for all levels involves judicial, executive and legislative input. The personnel councils within the courts formulates a reasoned opinion on the suitability of the candidate and sends it to the Judicial Council. In electing a candidate, the Judicial Council shall not be bound by the opinions of the personnel council or the Ministry. The National Assembly decides the appointment of a candidate to the position of Supreme Court Judges. The National Assembly has

[16] Two professors, two advocates and one lawyer.
[17] One judges of the Supreme Court, two judges of the high courts and three judges of a first level courts.
[18] Interview with the Vice-President of the Judicial Council of Slovenia, 2007 April 12th, Ljubljana.

rarely rejected the candidatures proposed by the Judicial Council; this is an evidence of a certain balance between the Council and the Parliament that in other countries has not been yet achieved. Court Presidents are appointed by the Minister of justice from among the candidates proposed by the Judicial Council. If the candidate is rejected, he/she may request the Administrative Court or to the Constitutional Court to review the decision.

JUDGES UNION

Slovenia is the only country belonging to the Former Yugoslavia in which a judges association was established already during the Socialist Republic. It was created in 1971 and before the independence it represented a place to discuss about salary, duties and judges problems. In this phase it was normal that all judges belonging to the association. In 1978 there was one of the first negotiation with the government about the judges salary and the association was treated as negotiating partner. This was a great success, but there were also important consultations in 1983/1984 when some judicial reforms were settled out, as well as in 1979 and 1984[19]. Today the Judges Association is fully recognized and legitimated but in the view of politicians and academics it is considered as a sort of "judges trade union". In fact, the bulk of the Association activity is linked to salary bargaining.

RECENT DEVELOPMENTS

Overall Slovenia acknowledged significant progress in the establishment of an independent judiciary, as the 1991 Constitution and the above-mentioned legislation incorporate the necessary formal elements to guarantee judicial independence. However, there are still area of concern, including the involvement of the executive in the judicial administration, the lack of public trust in the judiciary the absence of mechanisms ensuring intra-judicial integrity and external accountability (EUMAP 2001). From 2002 the Court Act was amended three times and according to the Judges Association[20], all these amendments were directed to increase the power of the government in the appointment of court presidents and in the cases distribution. According to the international observers monitors (EUMAP, EU and Cepej), despite the progress made in the past decade, public trust in the judiciary remains low. Some parliamentarians have also called for abolition of judges' life tenure. Some commentators argue that lack of political support could hamper the efficiency of the courts and undermines public support for the judiciary and its arguments. On the other side, the Judge Association admits that the inefficiency of the courts is a real problem and they are

[19] Interview with the President of the Judges Association of Slovenia, 2007 April 13th Ljubljana.
[20] Interview with the President of the Judges Association of Slovenia, 2007 April 13th Ljubljana.

committed to find some solution for the organisational problem that hampered the functioning of the judiciary.

The poor organisation of the judicial training represents another issue of concern related to the internal *coherence* of the judicial system. Slovenian judges admit that they have to insist on the socialisation in order to develop an adequate *esprit de corps* and to improve the professionalization of judges. Judges Association organizes each year a general conference with an high level of participation, in 2007 they focused all the program on "judicial training" trying to involve also the Ministerial representative. They are convinced that this type of events (common conferences, seminars and courses) could have a direct impact on the professionalization and consequently on the functioning of the judiciary as a whole. In the last year the number of Slovenian judges participating also in international conferences and networks is increased, although the members of the Judges Association admit that the language skill of the Slovenian judges is still really poor.

5. Judicial reforms in Croatia[21]

In Croatia, like in Serbia, the first post-Yugoslav elections opened the door to nationalistic forces led by the Croatian Democratic Union (HDZ) under the leadership of former Partisan General and political dissident Franjo Tudjman. The HDZ won the 1990 election for its anti-communist expression of Croatian identity. As long as Serbs occupied Croatian territory, Tudjman was able to monopolize power in Croatia. In December 1990 the new Constitution was passed which was a mixed presidential parliamentary system with strong presidential powers. He was able to tailor the new Constitution to his own ambitions in a perfect authoritarian style. For the whole decade of the 90s Croatian politics was in fact characterised by an authoritarian style of governance, accompanied by international isolationism and suspect towards any type of supranational organisation like the EU (Jović 2006). With Tudjman's death in the run-up to elections in 2000, a moderate six-party opposition coalition headed by the Social Democratic Party led by Racan won control of the parliament on a campaign that included accession to the EU.

Concerning the specific features of the judiciary, Uzelac (2000) describes as, from a formal legal standpoint, the 1990 Constitution provided a new regulation and status for judicial power. The changes were mainly reflected in the introduction of the division and separation of powers and in the warranties for the autonomy and independence of judicial power. The Constitution included also

[21] A complete analysis of the judicial reform process in Croatia during the 1990-2000 can be found in various contributions by Professor Uzelac, Law School of Zagreb. See in particular Uzelac (2000, 2003, 2004)

some vague provisions about the status of judges; judicial office was defined as "permanent" but with some exceptions that made the interpretation of this provision difficult and opaque[22].

Coehn (1992) reminds as, in spite of this provisions, less than six months after taking power, Tudjman had already replaced 280 judicial official. The controversial laws adopted following the Constitutional provisions gave the Minister of Justice wide latitude over the appointment and especially over the removal of personnel. Top officials in the Ministry would be able to decide whether judges had the proper human and civil qualities to fulfil their responsibilities. Some members of the legal community objected that the vagueness of the new laws threatened the independence at the same degree as the Communists used ideological criteria. New provision appeared to have as its sole aim the purging of former communist judges and prosecutors, allowing their replacement by new judges supportive of the Tudjman government. This means again a further decreasing of the professional qualifications and skills of judges, undermining the level of *autonomy* and *coherence*. The state of emergency declared during the 1991 Balkan war, meant a further concentration of powers in the hands of executive. Uzelac (2000) highlights that judicial reforms during the 90s may be better qualified as the lack of reform, or as an anti-reform. The absence of a mid-long range strategy of development was a clear message to the judiciary. Therefore, until the end of the 90s, there was a strong outflow of judges to other legal professions. Most of the judges that left the judiciary were among the best qualified and experienced; this contributed to decrease again the Croatian judiciary profesionalization.

JUDICIAL ADMINISTRATION AND ORGANIZATION

A hierarchy of legal system arranged in four levels characterizes the judiciary in Croatia. The Courts Act enacted in 1993 provides a basic legislative framework for the organization of the judiciary. Courts of General Jurisdiction are the first level. These courts adjudicate in all disputes except in those where law explicitly determines the jurisdiction of another court. These courts are organized in three instances and are divided into regions. Municipal Courts are courts with first instance jurisdiction in both civil and penal cases.

The Supreme court is the highest court in Croatia and as the last instance it decides on extraordinary legal remedies against valid court decisions of the courts of general jurisdiction (dismissed appeal), and all other courts in Croatia. The Supreme Court is also an appellate court in all cases where municipal court was the first instance (Kuecking and Žugi 2005). Supreme Court has significant administrative tasks and functions concerning the judiciary as a whole. However, also the Ministry

[22] Article 120: a judge may be relieved of his judicial office only 1. at his own request; 2. if he has become permanently incapacitated to perform his office; 3. if he has been sentenced for a criminal offence which makes him unworthy to hold judicial office; 4. if in conformity with law it is so decided by the High Judiciary Council of the Republic owing to the commission of an act of serious infringement of discipline (Uzelac 2000).

of Justice mantain a significant control over the court administration. Right to appeal is a constitutional right of every citizen and a right of every legal entity, according to the practice of the Constitutional Court.

The most interesting data about judicial organization in Croatia concern the rationalization of the territorial organization that seems still to be a relevant problem. On this aspect one of the interviewed[23] reminds as Croatia is the country with the higher number of judges pro-capita and also of courts[24]. What happened in the 90s was that Minister of Justice accused for the judiciary inefficiency, answered creating new courts, also where they were not needed. This over number of courts contributed to seriously undermine the functioning and the efficiency of the judiciary as a whole; this had also a negative impact over the public perception of the judiciary. This suggests that the simply hierarchical and horizontal development of the judiciary, considered as an indicator of *organizational complexity*, gives us only a partial explanation about the real level of institutionalization. Moreover, it seems that the only organizational *complexity*, without an adequate level of *autonomy* and *coherence*, does not have a decisive influence on the institutionalization of the judicial system.

SELF-GOVERNING BODY AND SELECTION PROCESS

The idea of a professional body responsible for conducting "internal affairs of the judiciary" and with relevant functions in the selection process was introduced in the Croatian Constitution in the period of the nation building and democracy optimism of 1990. The models were the French and the Italian *Superior Councils of the Judiciary*. But the idea of the self-government of the judiciary seemed to be too avant-garde for the period of transition as its implementation was delayed for many years.

In the period from 1991 to 1994, judiciary was in an informal limbo: judges were constitutionally well protected but on the practice they were put into a position of permanent provisionally (Uzelac 2000, 2003, 2004). The 1993 Court Act, according to the Constitution, provided that a body named "State Judicial Council" had to appoint, discipline and remove judges. However, until late 1994 there was no such body and no rules on its composition. In such a vacuum, according to Uzelac (2000) practice responded in various ways. "*Judges continued to be appointed and removed from office by Croatian Sabor (Parliament). In some five years, the mandate of a significant portion of judges expired; some of the judges simply continued to perform their functions (?!); some of them received formal decrees on the expiry of their mandate and consequent cessation of their office; and*

[23] Interview with a Professor of the Law Faculty- University of Zagreb, 2007 10th April, Zagreb.
[24] See CEPEJ (European Commission for the Efficiency of Justice) – European Judicial Systems Edition 2006 (http://www.coe.int/T/DG1/LegalCooperation/CEPEJ/evaluation/2006/CEPEJ_2006_eng.pdf)

some were simply notified that they have to empty the premises due to the "new situation" (Uzelac 2000: 8).

The Law on State Judicial Council (LSJC) passed in 1993. The LSJC foreseen that all members of the SJC have to be appointed with the 8 years mandate by the Parliament. The law provided also that in the process of selection of candidates for the president and the members of the SJC, Supreme Court of the RC, Minister of Justice, State Attorney, and the national Bar Association nominate persons considered to be suitable for the candidates.

The manner in which the SJC became a "lever in the hands of the executive" power was simple (Uzelac 2003). The time of the appointment coincided with the period of intense parliamentary crisis, during which most of the oppositional parties instructed their deputies to leave the parliament, and for several months the parliament enacted laws without debate, only by votes of the HDZ. A first clash in the process of appointment of the SJC members happened in the Supreme Court that presented two very different lists of candidates. The other bodies empowered for nomination also submitted their candidates. In the meantime, the leadership of the HDZ and Tudjman himself decided to take things into their hands: an informal commission presided by Tudjman's counsel for national affairs drafted its own list of candidates, vastly from people loyal to politics of the ruling party. Since such a body did not have official capacity to propose candidates, an innovative formula was found: the Attorney General presented such a list. All of the candidates from this list were accepted, and the candidates proposed by the legitimate professional bodies designated by law were rejected[25]. The Council began its activity during a period when authoritarian tendencies of the Tudjman regime were increasing. What the SJC did in this period was only controversial and reflected the political nature of its role. From 1995 to 2000 many of the provisions and the appointments made by the SJC were appealed toward the Constitutional Court, mainly by the Judges Association of Croatia and by groups of rejected candidates. The Constitutional Court accepted some of those appeals. In spite of this, prior of 2000, the Constitutional Court's victory over the SJC were merely formal, without concrete abrogation of the above mentioned provisions.

JUDGES UNION

The Croatian Judges Association was founded in 1991. In the middle of the 90s the Association tried to oppose the arbitrariness of the SJC but with poor results. A leadership was elected in late 1997 and since then the Association has achieved more significant victories,

[25]In fact, the only candidates who were appointed as members of the SJC without express political influence were two law professors nominated jointly by four Croatian law schools. These two later turned to be the most vehement critics of the actions of the SJC.

especially regarding the judges salary. About 80% of Croatian judges are member of the Association. In the last ten years the Association publicly criticized the government for various actions, with a very aggressive approach. Some of the interviewed retained that, given this aggressive and corporative style, the Association was rather counterproductive in the project of judicial reform. Starting from 2000, the Association opposed also many of the government innovations directed to adjust the functioning of the SJC. According to the expert interviewed, this *a priori* opposition to all the changes and innovations in the name of the judicial independence, contributed to undermine the public perception of the Association. Some interviewed argued that it is not a real professional association but rather a trade union. Now the association seems to be more open also to the international collaboration but, according to the opinion of the interviewed, its aim is always the same: maintaining the judges corporativism. Looking at the institutionalization dimensions, this empowerment of the judge representative, a common trend of the Western judiciaries, is a rather positive indicator of institutionalization, although not always functional to the reform goals. Nevertheless, without adequate spaces and opportunities of socialization, the effect of a so strong association becomes visible only in relation to salary and pecuniary matters.

RECENT DEVELOPMENT

The peak of the crisis between the judiciary and the government was reached in 1998-1999. After many cases of political appointment and removal in particular at the high level positions (famous is the case of the Supreme Court Presidents Vuković and Olujić) the public perception of an inefficient and politicized judiciary was widespread. In 1998 a new Minister of Justice was nominated (Milan Ramliak) a professor of the Zagreb law School; short after the Parliament asked him a task to prepare the basis for a comprehensive reform of the judiciary. With this aim, the Minister of Justice, for the first time in the Croatian history publicized various data from all the courts. It was the first public and informative survey on Croatian judiciary that evidenced the high length of proceedings and the backlog of old cases. The decisive strike came from the top of the state: in 1999, in Tudjman annual address to the nation, significant place was given to the problems of the judiciary. Only a few days after a tempest arose in the whole national judiciary, evidencing the absolute need of quick reforms.

In 1999 the Parliament enacted the Law on Judicial Salaries, raising them of about 50% and short after the along waited amendments to the Law on State Judicial Council were enacted. Then the events came to favour the judicial reform developments: the illness and the death of Tudjman and the result of the 2000 parliamentary election in which the HDZ was defeated by the democratic opposition. During 2000 the Constitutional Court repealed as unconstitutional several provision of

the SJC; among them those concerning the appointment and dismissal of judges and court presidents. The Constitutional Court imposed some decisions to made also significant change in the Constitution. The most relevant innovations, aimed at reducing the core of political intervention, were the establishment of a separate body for the attorneys and the reduction of the SJC members from 15 to 11, with the incompatibility of membership in SJC with court presidencies. Other provisions gave broader power to the Constitutional Court in appealing against SJC decision.

The appointment procedure was radically modified with the introduction of the judicial councils that, like in many other European countries, have duties regarding the court administration and the judge's evaluation for the appointment. The changes introduced in 2000, and the subsequent amendments to the Courts Act, formally provided adequate limitations to the political appointment. The SJC should appoint the judges only on the basis of professional criteria provided by judicial councils of each court, but many concerns remain about the lack of clearly defined objective criteria that councils must use. According to the experts interviewed, the difficulty in providing transparent information about judges makes the SJC members preferences stills the most influential criteria. On the whole, nowadays the public perception of the SJC is a little bit different, it is not yet perceived as a "leaver in the hands of the executive" but only as a sort of "hot potato" for the government, meaning that it is becoming a body of judges' lobby and influence.

Given those developments, it could be argued that the degree of *autonomy* has recently improved, although the system will need some years to embed the changes introduced. In this way, the Croatian candidature to the EU membership represents a powerful lever to reach at least the adoption of important rules and norms concerning the judiciary.

6. Judicial reforms in Serbia

In Serbia the judicial system that emerged from post-FRY transition kept working along the same previous patterns. It was in fact subordinated to the dominant party that was no longer the Yugoslavian Communist Party, but Milošević's socialist party (Miller 2000). As Cohen (1992) suggests, if Milošević in the first stage of his presidency declared his willingness to depoliticize legal matters with respect to the communist ideological criteria, he in truth operated a repoliticization of justice in terms of Serbia's ethnic interests.

Milošević's purge of the entire judicial system started in 1997-1998 and ended in 2000, when the crisis was clearly approaching. During this period, about nine hundred out of 2000 active judges in the entire Serbian judiciary system were dismissed and substituted. The judicial system that emerged from the ten-year Milošević government was weak from a professional as well as from a material point of view. Many of the judges that had somehow opposed the requests coming from the

regime had been dismissed and some of them still lived semi clandestinely. Those who were not removed only acted according to the regime's will. After 1996, no judicial decision was made that could somehow oppose Milošević's party.

During the Milošević decade the level of judicial institutionalization further decreased. If during the federal republic the "double system of conflict resolution" leaved some space for the judges independence, with Milošević in office every type of judicial cases had to be solved with the regime agreement. Thus, the level of adaptability, the differentiation and the autonomy of the judicial system were weakened in respect to the FRY period. Immediately after Milošević's discharge, the first step made by the *ad interim* Koštunica[26] government was to re-establish the old judicial system legislation and to cancel all those decisions, made by Milošević, that had caused dismissal of those judges that had opposed election fraud and manipulation promoted by the regime (especially the 1996 election). What needs to be underlined here is that a potential purge of the judiciary became an urgent issue after the 2000 October Revolution. However, the transition leaders decided to reform the system without deeply invading the judicial body[27]. One of the experts interviewed[28] underlines that, if a drastic *lustratia* had been performed, the Serbian judiciary would had been halved. The lack of an adequate number of candidates potentially suitable for taking the role of magistrate was one of the reasons for undertaking the organisational reform path without a *lustratia*.

JUDICIAL ORGANIZATION AND ADMINISTRATION

The first significant stage of the judicial system reform seemed to have been reached in November 2001 with the launch of an important set of judicial system-related laws. The set was made of five laws: 1) Law on Judges; 2) Law on Public Prosecution; 3) Law on High Judicial Council; 4) Law on courts organization; 5) Law on Seats and Districts of Courts and Public Prosecutor's Offices (all published in the Official Gazette of Serbia, n° 63/2001). Overall, the five laws in their original drafting should have introduced some fairly relevant changes.

According to the Law on the Organization of Courts, the court system of Serbia is divided into courts of general jurisdiction and specialized courts. Courts of general jurisdiction include the Supreme Court, courts of appeal (which still have not been constituted), and municipal and district courts. Specialized courts include the commercial courts and the yet to be constituted Administrative Court. Special panels for prosecuting war crimes and organized crime have been established within the Belgrade District Court. In addition, a Constitutional Court hears and decides

[26] On 6 October 2000 Koštunica, during his first official speech, affirmed to be willing to create an ad interim government. This lasted until December, when official elections took place and Djindjić was nominated Prime Minister of a majority government in which all the parties of the DOS coalition participated.

[27] The ad interim government actually adopted a 'forced dismissal' policy by inviting judges in relevant positions to leave their office. However, the entity and concreteness of these measures was never such as to be described as a real purge.

[28] Interview with a Serbian jurist, Political Advisor at the Stability Pact for Southern Europe, June 2006, Brussels.

matters that involve the constitutionality of laws, regulations, and official acts. The Supreme Court is the highest court of general jurisdiction in Serbia. There are 138 municipal courts and 30 district courts located throughout Serbia. The municipal and district courts are courts of general jurisdiction. District courts also exercise first instance jurisdiction but in matters of a more serious nature. Until the new courts of appeal are constituted, district courts will continue to serve as courts of second instance and hear appeals from municipal court decisions. Decisions of municipal and district courts may be appealed to the appellate courts once these courts are constituted (ABA-Ceeli 2005). Judicial administration function is mainly in the hands of the Ministry of Justice.

Looking at the *organizational complexity* of the Serbian judiciary it could be noticed as the organizational structure, especially considering the hierarchical level, is still uncompleted and frequently subjected to changes. Special courts and panels have been established but persistently threatened by political control and influence.

SELF-GOVERNING BODY AND SELECTION

The introduction of a new self-governed body, which was meant to play an important role in the recruitment process, represented, however, the most relevant change introduced by the above mentioned laws. The Law on Judges established that magistrates would be elected by the National Assembly according to the suggestions of the High Council of the Judiciary (HJC). Such law established that the HCJ should be composed of six permanent and two 'invited' members (a judge and a Public Prosecutor). The President of the Superior Court, the District Attorney, the Minister for Justice, a member elected by the Lawyers Association and two members elected by the National Assembly were part of the six members (Art. 3). According to the Law, National Assembly should elect only the candidates proposed by the HCJ. In light of the above-mentioned changes this body should have taken on a relevant role in recruiting and selecting magistrates. In the meantime, the Law on Judges provided for creation of another body, the Grand Personnel Council (GPC). This differed from the HCJ because the latter was in charge of all decisions concerning the dismissal or the termination of the judge's function. This body was made of nine judges of the Superior Court nominated by the president of the court itself.

These data already explains that the only function attributed to the HCJ regarded candidature proposals with the presence of another institution, strictly related to the Ministry, which decided on dismissal/termination issues. The Law on Judges foresaw that the National Assembly was obliged to nominate magistrates only via candidatures proposed by the HCJ. In the case the candidatures proposed by the HCJ were rejected, it had to reconsider them and propose some new ones. Already in July 2002, the Serbian Democratic Party (DSS, Koštunica Party) proposed a set of amendments

to the five laws on the judicial system. The National Assembly adopted such amendments at once. They aimed at changing exactly the Law on Judges, establishing that the National Assembly could reject candidatures proposed by the HCJ and nominate some other candidates appointed by a special commission within the National Assembly. There was therefore an attempt to create another body, directly connected to the National Assembly, which would allow the parties to control the appointments more directly. At the beginning of 2003 the HCJ had not yet been established because of delays and general problems in achieving an agreement on the choice of the members[29]. At the beginning of 2003 the DSS proposed new amendments aiming at reaffirming the role of the National Assembly in recruitment of magistrates. The attempt to reaffirm the power of the National Assembly over the nomination of judges for the disadvantage of the self-government body represented the thread running through the different amendments.

The assassination of Djindjić in 2003 worsened the situation. This year represented another stalemate[30] for judicial reform, since the debate on the 2001 set of laws, which yet had not been applied, was suspended. The first months of 2004, after the new Koštunica government came into office, seemed to give new impetus overcoming the stalling created during the state of emergency. In April 2004, the government proposed some new amendments updating the Law on Judges on the basis of the different sentences delivered by the Constitutional Court during the previous years. These new amendments gave back to the HCJ the power to propose candidates for the nomination as magistrates and court presidents. However, in truth, the governments continued to reject several nominations coming from the HCJ until December 2004.

JUDGES UNION

This Association, which was initially formed by magistrates who had opposed the manipulation of the outcome of the 1996 election, was not legalised for a few years. In 1999, 13 judges were dismissed because of their active involvement in the Serbian Judges Association Following the dismissal of these judges it suspended its activity. It reopened only in 2000, when it finally was registered as one of the legally recognised associations. This association is today the only collective actor that expresses a precise point of view on judicial reform and tries to be a interlocutor of the government. The Serbian Judges Association was never involved in judicial

[29] As Hiber (2005) and the OSCE report (2003) describe, at the end of the several disputes regarding the institution of the HCJ the Superior Serbian Court maintained the main power of the choice of the members that would have to compose the HCJ. The judges of the Superior Court are nominated directly by the National Assembly.

[30] Several articles on daily newspapers and basically all the humanitarian agencies' reports highlighted that during the state of emergency, the Serbian government explicitly violated its citizens' human rights. In the days following the murder of Djindjić a particularly serious case was registered: the Parliament dismissed 35 judges without receiving permission from the Superior Court, which was formally necessary. As a consequence of this, the President of the Superior Court resigned (ABA Ceeli 2005; Osce 2003; EU SAP Report 2004).

policies, not even concerning salary. Despite considerable challenges, the Association has tried to organize many activities to professionalize judges and to diffuse international practice and standards in Serbia. International donors as USAID and ABA-Ceeli particularly supported them. The only project in which the Association was involved together with a governmental representative is the Judicial Training Centre, fully established throughout international donors funds, especially UNDP, USAID and OSCE. The training program that were activated seemed to be useful and quite effective. According to the interviewed, today there are a part of Serbian judges that, thanks to the various experience of international socialization, acquired new competences and qualifications. Although only a small part of judges have beneficed of those occasions.

The level of institutionalization of this Association is very low. The government does absolutely not considered them. If this organization would be able to work in cooperation with the Ministry of Justice, they would be able to increase significantly the level of *coherence* within the judiciary.

RECENT DEVELOPMENTS

During the 2005, no substantial reforms have been approved and the influence of the political parties over the judiciary continued to be high and visible. A definitive text for the judicial reform strategy was then presented by the government in April 2006. The government stressed the adoption of this strategy and affirmed that this represented a relevant step in the judicial reformation process[31]. However, once again the recruitment rules and the self-government functions represented the crucial knots. (Mitev-Shantek 2006). The Judges Association was not involved in the drafting of the strategy, although they prepared documents and papers in order to integrate it. In spite of the approval of the Strategy (May 2006), few of the provisions it contains have been implemented[32].

The new Constitution, approved by a national referendum at the end of October 2006, will bring substantial changes also in relation to the judiciary. The Constitution mentions, for the first time in the Serbian history, the existence of a self-governing body for the judiciary that will be in charge of appointment and promotion procedures. Many of the innovations contained in the Strategy and in the new Constitution need, in fact, additional legislation to allow their implementation.

The Helsinki Committee for Human Rights in its 2006 report[33] evidenced as the judiciary is most stagnant sector of reform in Serbia. In the course of the 2006 the government considered as their biggest success the number of law passed by the parliament. The enforcement of that laws remained

[31] The government approved the strategy to comply with the requests of the EU that was asking for it since 2004 in the context of the Stabilization and Association Process; the drafting of the strategy is the direct result of the work done by international donors, some of them working with EU funds. On this aspect see Dallara 2007.

[32] Interview with the former President of the Judges Association of Serbia, 2006 October 26th, Belgrade.

[33] Helsinki Committee for Human Rights. Annual Report: Serbia 2006. Human rights: hostage to the state regression. Belgrade 2007.

totally silent. Political parties (both majority and opposition ones) acted as a sort of cohesive block, aiming at inhibiting the reform process, being afraid of the possible consequences of the reform. In early 2007 some ministers proposed to reelect all the judges by a government's initiative. This caused sharp reaction of public and legal experts. Corruption and clientelism, widespread within Serbian parties and political institutions, make virtually impossible the establishment of an independent judiciary. According to the interviewed, within the judicial system, there is an imaginary thin line between two states of minds: that of judges that are afraid for the political pressure over the judiciary and the other of judges that are not afraid and that see their career linked to the political will. Thus, they accept passively the political will. For sure this is one of the most evident legacies of the past that Serbia is not yet able to overcome. The level of *autonomy* is thus extremely low.

7. Conclusions:

According to Bumin, Randazzo and Walker (2005), courts are enabled to undergo the process of institutionalization only if political and legal stability allows the court to develop properly, contributing to judicial effectiveness. This implies that the stability of the domestic political environment, that is the absence of high political fragmentation, the absence of ethnic cleavages and a finished state-building, became necessary conditions for the institutionalization of the judiciary. These conditions were virtually absent in the historical and political events of the Yugoslavian countries. In fact, the analysis of the main steps of the judicial reform in each country shows that, starting from the Yugoslav federation desegregation (1990), the process of judicial institutionalization was continually undermined by the political instability that characterized all the area, impeding the courts to reach an adequate level of *complexity*, *autonomy* and *coherence*. The main reason seems to be that in these countries, especially in Serbia and Croatia, the 1990s decade represent a sort of step back for what concerns the judicial institutionalization as these countries experienced ethno-authoritarian hybrid regimes in which a sort of ethno-political justice replaced socialist legality (Cohen 1992). This happened also in Slovenia although to a limited extent and only at the beginning of the 90s. This stalling situation, in term of institutionalization, implied that when the ethno-authoritarian regimes fallen down in Serbia and Croatia (2000), any of the above mentioned dimensions for the judicial institutionalization were not fully reached. Although some progresses were undoubtedly accomplished in the last fifteen years, it is necessary to make a clear distinction between the formal adoption and the implementation of judicial institutions and reforms. A common feature of the countries is in fact the adoption of rules, norms and institutions that seem

to empower the judicial system vis-à-vis the other political institutions, but that remain mainly only on the paper. Thus, the only formal establishment of judicial institutions and norms cannot be considered as a valid indicator of judicial institutionalisation.

Even in the last decade, the process of judicial institutionalisation continued to be threatened by domestic political instability and fragmentation. In this context political actors rather than empowering courts in strategic way, as the comparative judicial studies literature suggest, continued to maintain the judiciary as a sort of "inferior power", claiming for the lack of profesionalization and efficiency. Under this attacks, the magistracy seems to be still unable to fill the gap in the socialization and professionalization of the corps, missing a fully institutionalisation.

Looking at the legacy of the past framework, former Yugoslavian countries are a very interesting case for three main reasons: first of all, although for many features the Yugoslav socialism matches the definition of authoritarian regime (Linz 1975), even with some traits of a democratizing and pluralistic authoritarianism, for what concerns the organization and the functioning of the judicial system seems to belong to the totalitarian type. Although the "double-system of justice" was in place also in Yugoslavia, what distinguishes it from the Southern European authoritarian regimes was the high degree of party control over the appointment and dismissal of judges. If in the experience of the Southern European countries during the non-democratic regime the professional recruitment and socialisation criteria of magistrates coexisted with the political ones, it was not the same in Yugoslavia. The totalitarian traits of the organization of the judiciary in Yugoslavia impeded the judicial institutions to reach the qualities of viable and stable institutions.

Finally, if we aim to explain the low judicial institutionalization looking at the legacies of the past, it seems important to take into account also the legacies of the period that precedes the non-democratic regimes, that is the period form the end of 1800 until the Second World War. A substantial difference between the countries of the Balkan region and the Southern European ones concerns the fact that in the former ones, as mentioned above, the Romanist civil law tradition was introduced later. Moreover, during the nineteenth century, the unstable socio-political system reigning in the countries belonging to that area delayed the development and modernisation of the political and administrative institutions in different national contexts (Hosch 2006). When Western Balkan countries entered the Soviet sphere of influence, an institutionalised judiciary system did not yet exist. We have already mentioned that the majority of the judicial institutions were created during the soviet experience. While in the Southern European countries, the institutional framework at the basis of the judicial systems had fully developed and had incorporated all the fundamental elements for the civil law before the authoritarian regimes phase. This allowed some norms and

habits to survive even during the non-democratic regime phases, preserving a minimum level of professionalism in the magistracy.

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